No. 12245.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter. This court has jurisdiction of the appeal.

The offense charged was triable by the District Court under authority of Title 21, United States Code, Section 174, wherein the offense was defined, and of Title 28, United States Code, Section 41, Subdivision 2, which confers jurisdiction to try the case upon the District Court. This Court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225(a) and (d), which treat of the jurisdiction of Courts of Appeal.

Statement of Case.

On November 17, 1948, appellant [there were two other defendants] was indicted by the Grand Jury for the Southern District of California. The Indictment was in three counts.

Count One charges a violation of Title 21, United States Code, Section 174, commonly referred to as the Jones-Miller Act. [T. R. 2-3.]

Count Two charges a violation of Title 26, United States Code, Section 2553(a), commonly referred to as the Harrison Narcotic Act. [T. R. 3.]

Count Three charges a conspiracy, under Title 18, United States Code, Sections 2 and 371, to commit the substantive offense charged in Count One. [T. R. 3-5.]

After the first witness for the Government was sworn and a question asked appellant objected to the introduction of any evidence and moved a dismissal on the ground that the indictment did not state a public offense. [R. T. 17.] After argument [R. T. 18-60], the Court overruled the objection as to Count One and sustained the objection as to Count Two [R. T. 60-63.] After further argument [R. T. 63-67], the Court sustained the objection to Count Three. [R. T. 67.]

Thereupon, that is to say after the Court had ruled that Counts Two and Three failed to state a public offense, appellant moved for a judgment of acquittal as to Counts Two and Three. [R. T. 67.] This motion the

Court granted "on the grounds stated by the Court" [R. T. 68], *i.e.*, that Counts Two and Three failed to state a public offense.

The trial then proceeded as to Count One and resulted in the conviction of appellant and a co-defendant and an acquittal of a third co-defendant. [T. R. 7-8.] Judgment was filed April 11, 1949.

A motion for a new trial was filed by appellant on January 17, 1949 [T. R. 8-13] and the same was denied by the Court on April 11, 1949 [T. R. 14-16] at which time appellant's motion for *non obstante verdicto* was also denied. [T. R. 15.]

On April 14, 1949, appellant filed his notice of appeal. [T. R. 16-17.]

ARGUMENT.

POINT I.

Count One of the Indictment States a Public Offense.

Rule 7 of the Rules of Criminal Procedure for the District Courts of the United States describes the nature and contents of an indictment and provides in subdivision (c) thereof, in so far as is here pertinent, that:

> "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * *."

An indictment, following Form No. 1 in the appendix to the Rules, charging that the murder was committed "with premeditation" but omitting to charge that it was committed "with malice aforethought," as provided in the statutory definition of murder [18 U. S. C. 452], was approved by this Court on April 5, 1948.

> *United States v. Carlos Romero Ochoa,* 167 F. 2d 341.

"A plain, concise and definite written statement of the essential facts constituting the offense charged" in the instant case is contained in Count One. It alleges that "on or about September 23, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Milton Theodore Shafer [appellant], Thomas Winfrey, and Fred Earl Spelmon

> did receive, conceal, and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely: approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law." [T. R. 2-3.]

Paraphrasing Count One, it is alleged that appellant

> did receive, conceal, and facilitate the transportation and concealment, after importation, of heroin which, as the *appellant then and there well knew, had been imported into the United States contrary to law.*

It is appellee's position that the words italicized above constitute precisely the scienter described in the statute, Title 21, United States Code, Section 174. This statute, according to our interpretation and in so far as is here pertinent, divides itself into two parts. To make our position clear we quote the statute verbatim but leave a space at the point where we feel the statute divides itself, to wit:

> "If any person *fraudulently or knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing,
>
> or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, *knowing the same to have been imported contrary to law*, * * *." (Italics added.)
>
> 42 Stat. 596.

The italicized "fraudulently or knowingly" in the first division above modifies importations "contrary to law" in said first division of the statute. It defines the scienter that makes importation unlawful.

The italicized "knowing the same to have been imported contrary to law" in the second division above modifies the phrase "any such narcotic drug after being imported or brought in" appearing in said second division of the statute. It defines the scienter that makes the receiving, concealing, buying or selling unlawful.

Count One of the indictment in the instant case was based on the second division of the statute. In consequence the "fraudulently or knowingly" of the first division modifying importations "contrary to law" was inappropriate and would have been redundant had it been charged in the indictment.

It is submitted that Count One contained a plain, concise and definite statement of all essential facts constituting the offense charged. The requisite scienter with respect to "knowingly" was charged in the allegation that appellant "knew" the heroin which he allegedly received, concealed, etc., "had been imported into the United States of America contrary to law." [T. R. 2-3.]

The requisite guilty knowledge was alleged.

POINT II.

There Was No Double Jeopardy.

Points II, III, IV and V of Appellant's Opening Brief are here treated collectively.

There was no inconsistency or illegality in the verdict. It would be of no consequence if there were inconsistency.

Dunn v. United States (1932), 284 U. S. 390, 393.

Appellant's Points II, III, IV and V, in legal contemplation, are all one, to wit, "double jeopardy." However, this claim cannot be made intelligently and in good faith by appellant. This is true for the reason that appellant urged upon the trial court, and prevailed upon the trial court to hold, that Counts Two and Three failed to state a public offense. Thereafter appellant moved the trial court for judgment of acquittal as to Counts Two and Three which the court also granted but on the ground that those counts of the indictment failed to state a public offense. [R. T. 63-68.]

A judgment of acquittal on a count or counts which fail to allege or charge any offense is surely and clearly no determination of the issues contained in a count properly charging a public offense. In truth a judgment of acquittal under a count which does not charge an offense is a judgment of acquittal of nothing.

Looking through form to substance in this case and denominating the ruling of the court by any terminology, one discovers that the issues under Counts Two and Three of the indictment were not submitted to the jury and those counts were in effect dismissed by the Trial Court on the ground that they failed to state a public offense.

For appellant to seriously and intelligently claim double jeopardy on this appeal even on the ground that Counts Two and Three were decided on the merits by a judgment of acquittal, it would require that appellant here urge upon this court that Counts Two and Three did state a public offense in complete reversal of appellant's position in the Trial Court. Appellant is estopped to adopt here what he successfully rejected in the Court below.

This Court has recently held, with respect to the issues here that

> "* * * a dismissal of one count, where the indictment charges the same offense in two counts, even after all the evidence is in, does not operate as a bar to a subsequent indictment for the same offense. Craig v. United States, 81 Fed. (2d) 816, 819, cert. den. 298 U. S. 690, rehearing den. 299 U. S. 620; O'Malley v. United States, 128 Fed. (2d) 676, 684 (Cir. 8); *cf.* Dunn v. United States, 284 U. S. 390, 393. In the Craig case an earlier trial had resulted in the discharge of the jury for failure to agree after the defendant had successfully moved for a dismissal of one of two counts charging the same offense. On a second trial for the same offense, the defendant's plea of former jeopardy was overruled by the trial court, and this court affirmed. Assuming that the same offense is charged in both counts of the indictment in the instant case, if a second trial would not be barred, *a fortiori,* a submission of the first count to the jury in the same trial would not violate appellant's right not to be placed twice in jeopardy for the same offense."
>
> *Barsock v. United States, Case No.* 12,013, decided August 12, 1949.

Conclusion.

It is respectfully submitted that Count One of the indictment charges an offense against the laws of the United States; that appellant was not placed in double jeopardy; that the record abounds in substantial and adequate evidence of appellant's guilt under Count One and that it is free from error.

Respectfully submitted,

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